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August 1, 2005

Marlene R. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte, CC Docket No. 02-33

Dear Ms. Dortch:

Pac West understands that the Commission is considering a decision in the Wireline Broadband NPRM that would remove broadband Internet access services provided by wireline telecommunications carriers from Title II Common Carrier regulation and leave it subject to regulation under Title I. Pac West believes that the Commission is considering this action to achieve a reasonable policy goal – to treat similar *services* under similar regulatory schemes. Pac West is not opposed to that goal, but is concerned about the potential ramifications and potential unintended consequences of such a decision.¹ Pac West urges the Commission to take care in several regards if it takes the steps described above. It is Pac West's view that it is essential that the Commission make just as clear what is not being done as what is being done.

Pac West believes that the pending decision would, by intent, address only broadband Internet access service to the extent the Internet information service was “integrated” with the underlying broadband transport service, and would not apply to facilities used to provide any other service in the ILEC network or, the same facilities to the extent they are used to provide services other than broadband Internet access service.² Such a limitation should be explicit in any order.

Pac West's concern is that unless carefully delineated and limited, such an order would allow an ILEC to argue that it could:

1. convert all of its service offerings into products using a DSL platform,

¹ See Appendix A

² See *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, Case No. 04-277 (slip op. June 27, 2005) at section IV.A.

2. migrate all customers using those products onto IP networks that would also be subject only to Title I regulation, and then, over time,
3. escape the Title II obligations to not discriminate against other carriers, permitting it to degrade its interconnection with other carriers including Pac West, thereby devaluing the separate networks of Pac West and other competitive LECs.

Pac West's concerns are heightened by the fact that if the AT&T and MCI mergers are approved, SBC and Verizon, after acquiring the Tier 1 backbone networks previously owned by AT&T and MCI, would also exert market power over interconnection to their global IP networks. If this happened, telecommunications regulation under Title II would have been set loose from its moorings. Interconnection has always been a key to effective network competition. The 1913 Kingsbury Commitment between the Bell System and the DOJ included a pledge to interconnect the large Bell network with smaller independent networks. The 1984 Bell System divestiture included non-discriminatory interconnection between the local networks and the competitive long-distance carriers as a key component. The 1996 Telecom Act dealt extensively with interconnection rights and obligations.

From 1913 to 2005, much of the impetus for regulatory action was driven by large network operators refusing to interconnect with small network operators on a non-discriminatory basis. Before 1913, the Bell System simply refused. Prior to the 1982 consent decree, the Bell System imposed discriminatory costs and terms for interconnection on competitors. After the 1996 Act, interconnection negotiations between competitors and the BOCs have been contentious and frequently decided only after arbitration.

Given the history of interconnection, the key role it plays in a competitive network market, and the past intransigence of large incumbents resisting effective interconnection, it should come as no surprise that Pac West is concerned that network interconnection should not be allowed to be harmed as services are moved to Title I. In this regard Pac West notes that interconnection of networks is just as essential to *intermodal* competition as it is to *intramodal* competition.

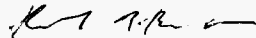
Pac West does not believe the Commission seeks this harmful departure from precedent. Pac West believes that the Commission has every intention of preserving regulation of communications services and the interconnection of networks to the extent necessary to preserve an effectively competitive market. What the Commission must guard against is the gradual creep of monopoly-provided services, facilities, and interconnection into deregulation. Competitors like Pac West have a long history of difficulty getting the BOCs to comply with the statutes and regulations that currently exist regarding the interconnection of networks, exchange of traffic and compensation for services. Earlier competitors had the same difficulties going back to the birth of the industry. Trying to obtain and enforce interconnection agreements as network technology moves from circuit-switched to packet-switched will be virtually impossible in the absence of enforceable rights to interconnection. It would take another perfect confluence

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of a highly motivated competitor with sufficient resources (like MCI) with another highly motivated judge (like Judge Greene) and a highly motivated federal antitrust division (as existed in the 70s and early 80s) to undo the damage that would inevitably result from deregulating network interconnection with the largest networks.

To avoid these results, Pac West urges the Commission to make clear that it intends only to deregulate broadband internet access services provided by wireline carriers. The Commission should make clear that any other aspect of the regulation of network facilities or the regulation of the interconnection of network facilities would remain unchanged, and any attempts by a BOC to slide any other services, facilities or other interconnection obligations under the Title I tent would be strongly resisted by the Commission.

Sincerely,



Richard M. Rindler
Counsel to Pac West Telecomm, Inc.

cc: John Sumpter
Kevin J. Martin, Chairman
Kathleen Q. Abernathy, Commissioner
Michael J. Copps, Commissioner
Jonathan S. Adelstein, Commissioner

Appendix A

Potential unintended consequences

If the Commission blurs the distinction between *common carriers* and “*nontraditional communications services providers*” (as it appears to be doing in the cable modem, wireline, Broadband, SBC-IS numbering petition and VoIP proceedings), there may be unintended harmful consequences that take the Commission away from other desired policy goals.

- Interconnection rights and obligations are clearly defined for carriers under Title II. It is not clear what happens to those obligations and rights as services are moved to Title I because the Commission has yet to issue rules under its Title I ancillary jurisdiction authority. The basis for the confusion is the potential disconnect between *services*, *facilities* and *carriers*. That is, if a carrier’s service is moved to Title I, but the carrier itself remains subject to Title II obligations, does the act of moving the service to Title I also move the carrier to Title I? In that case, would other carriers’ interconnection rights evaporate with regard to carriers now covered by Title I? Pac West believes that moving a service to Title I should not have this impact, but would expect the BOCs to make the argument.
- Universal service carrier obligations to collect funds from customers and remit to fund administrators arises under Title II in Section 254. As services move away from Title II regulation, must the Commission create new universal service obligations under Title I, or do Title II universal service obligations somehow follow the migratory path to Title I? To the extent that current statutes and implementing rules apply such obligations to Title II *carriers* does the reclassification of *services* to Title I affect a carrier’s collection and remittance obligations? If *carriers* cease to be classified as carriers (i.e., instead classified as *Information Service Providers*), do they no longer have the obligation to collect from its customers?
- Do universal service obligations to collect funds from customers and remit them to fund administrators attach to Title I service providers? If there are three or more entities collaborating to provide service to an “end-user” (for example, an IP-backbone network, a VoIP vendor with no network facilities beyond its servers and software, and an IP-loop entity) and none of the entities is a Title II *carrier*, which of the three entities has the obligation to collect from the end-user? Any one of the three entities might have the “retail relationship” with the “end-user,” or the end-user could itself be a reseller, claiming to the other entities that it is not an end-user. Under the current dichotomy between Title II carriers and end-users (a fairly clear distinction), existing conventions allow a carrier to determine when it should collect/remit, and when it is selling a “wholesale” service to another carrier and does not collect/remit.
- What are Title I service providers’ rights to receive universal service funding from pool administrators? To the extent a *carrier* under Title II becomes a “non-carrier” under Title I (regardless of the entity’s new classification title), does it retain or lose its rights to obtain compensation from the universal service fund(s)?

- To the extent that services are reclassified as Title I, do those services move beyond the reach of municipal fees on telecommunications services?
- Traditionally (by statute and rule), *carriers* have had the obligation to obtain and administer numbers. End-users (that is, *non-carriers*) have the right to demand that a number be ported from an existing service provider to a new service provider. How do number portability requirements apply to these non-carriers?
- What are the intercarrier compensation obligations of these non-traditional communications services providers? Are they permitted to use other carriers' networks, including transit service providers' networks, without having to pay for such use? Are carriers permitted to block traffic from such non-traditional communications services providers on the grounds that they are simply end users that refuse to pay their bills?
- What technical standards apply to traffic exchanged with such non-traditional communications services providers? Carriers are expected to maintain an ANI in the SS7 message. End-users have no such expectations. As carriers are reclassified to Title I and are no longer classified as common carriers, do the standards evaporate?

Quite simply, there are ample reasons why previous Commissions have promulgated regulations applicable to carriers under Title II. Those reasons do not vanish simply because this Commission believes in deregulatory policies. Pac West is concerned that moving services into Title I in order to keep them away from Title II requirements has the potential to cause the Commission to expend considerably more effort creating a host of new regulations under Title I than it would expend by reforming its Title II requirements.